Agensi Pekerjaan DZH Sdn Bhd (formely known as DZH Management Consultants Sdn Bhd) & Anor v Tropicana Makmur Gagah Sdn Bhd (formely known as Raindust Realty Sdn Bhd) & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-1784–09 OF 2022, W-02(IM)(NCVC)-1785–09 OF 2022, W-02(IM)(NCVC)-1786–09 OF 2022 AND W-02(IM)(NCVC)-1796–09 OF 2022

KAMALUDIN MD SAID, HASHIM HAMZAH AND AZMI ARIFFIN JJCA

13 MAY 2024

Civil Procedure — Striking out — Writ and statement of claim — Appeal against order allowing striking out — Whether issues raised previously ventilated by parties — Whether earlier court decided on issues raised — Whether plaintiffs' claim barred by doctrine of res judicata — Whether pleading disclosed reasonable action — Whether evidence produced during striking out application justified any trial — Whether claim frivolous and legally unsustainable — Rules of Court 2012 O 18 r 19

There were two suits filed by Genting Development Sdn Bhd ('first defendant') and Tropicana Makmur Gagah Sdn Bhd ('fourth defendant') before the magistrate court against Agensi Pekerjaan Dzh Sdn Bhd ('first plaintiff'), who was the tenant of the first defendant for a piece of land ('said land') with a four-storey building on the said land ('demised premises') vide a tenancy agreement dated 12 December 2013 ('TA 2013'). Pursuant to TA 2013, the period of tenancy was said to be from 2014 till 2017. Also, both the first defendant and first plaintiff had mutually agreed that first plaintiff would rent the said land for a total period of fifteen years from 2014 until 2029. In the first suit ('Suit 183'), the fourth defendant was seeking a recovery for vacant possession of the demised premises against the first plaintiff and in the second suit ('Suit 837'), the first defendant was seeking recovery of rentals and charges outstanding against the first plaintiff. The fourth defendant's application for sought for summary judgment against the first plaintiff in both suits were successful but the first plaintiff's appeal against the said decision was dismissed by the High Court. The plaintiffs then subsequently commenced an action ('civil suit') against the defendants alleging that after signing some blank papers under the influence of the third defendant, the plaintiffs were informed that the first defendant had disposed the land together with the said demised premises to Tropicana Laris Sdn Bhd ('seventh defendant'). In the said notice,

it was revealed that the seventh defendant had nominated the fourth defendant to accept the transfer and pursuant to the said assignment, assigned absolutely to the fourth defendant all the seventh defendant's rights, title, benefit proceed and interest therein under a tenancy agreement dated 25 April 2019 ('alleged TA 2019'). The plaintiffs also came to know that the seventh defendant had purchased the said land together with the said demised premises from the first defendant, six months after the alleged TA 2019 was duly executed and perfected by the first plaintiff. It was the plaintiffs' further allegation that all the defendants had conspired and committed fraud to defraud the plaintiffs in entering into the alleged TA 2019 to dispose the said land in dispute where the plaintiffs were occupying then. The first to seventh defendants applied to strike out the plaintiffs' claim against them under O 18 r 19 of the Rules of Court 2012 on the ground that the plaintiffs' claims were barred by the doctrine of res judicata based on the judgments of the magistrate court in suits 183 and 837. The judicial commissioner ('the JC') allowed the striking out application and ordered costs of RM15,000 to be paid by the plaintiffs to each of the defendants. Being dissatisfied with the High Court decision, the plaintiffs appealed to the Court of Appeal vide four separate notices of appeal.

Held, dismiss the appeal with costs:

(1) The issues and/or allegations of frauds, misrepresentation etc, raised in the civil suit was caught under res judicata as these issues had been ventilated and decided with finality. Such allegations were mere figments of the plaintiffs' imagination raised for a collateral purpose of delaying the claims by the first defendant and the fourth defendant. The mere mention of fraud or misrepresentation alleged in a claim did not automatically justify the setting down of a claim for trial. The court must determine whether the pleading disclosed a reasonable claim and whether the evidence produced during a striking out application justify any trial. If the claim was clearly frivolous and patently obviously unsustainable, then it should be struck out (see paras 45–46).

(2) It was crystal clear and unambiguous that the plaintiffs were just making another round of attempt to relitigate issues that had already been determined. It could not now be revisited or reasserted under any guise in a subsequent proceeding as it amounted to an abuse of the court's process. Since both suits arose from the same set of facts, the doctrine of issue estoppel would apply. The law did not allow the plaintiffs to have a second bite of the cherry. The JC was correct in allowing the defendants application to strike out the plaintiffs' writs of summons and statement of claim filed against the defendants. The plaintiffs' claim was done with mala fide intentions, frivolous and unsustainable (see paras 44 & 47).

(3) Since the first plaintiff refused to pay the outstanding rentals despite continuing to occupy the demised premises, the fourth defendant had

then initiated a suit at the High Court for the outstanding rentals and judgment had been given, after hearing of the same allegations of fraud, misrepresentation, conspiracy raised by the first plaintiff at that stage. The High Court had also declared that TA 2019 was validly and lawfully terminated and hence there was no issue of the alleged fraud, misrepresentation etc. As there was no appeal filed by the first plaintiff against that High Court decision dismissing the first plaintiff's appeals, the judgment continued to be valid and binding on the parties and must be obeyed. It would be res judicata for the plaintiffs to raise the same in a fresh suit (see paras 48–49).

(4) The plaintiff's admission on the existence of the tenancy, its agreement to surrender the said property back to the fourth defendant and requested for discount to be given on the sums outstanding, made it impossible for the plaintiffs to deny the validity of the termination of the tenancy. The bare allegations of fraud, misrepresentation, or forgery which surfaced when the first defendant filed the suits against first plaintiff for outstanding payments of the rentals and charges vide Suit 183 and Suit 837 for vacant possession of the land, strengthened the facts that the first plaintiff claims was unjustified, a mere excuse to escape liability and did not constitute any triable issue. There were no error or misdirection on the part of the JC in coming to such a decision that warranted appellate intervention (see paras 51 & 53–54).

[Bahasa Malaysia summary

Terdapat dua tindakan yang difailkan oleh Genting Development Sdn Bhd ('defendan pertama') dan Tropicana Makmur Gagah Sdn Bhd ('defendan keempat') di hadapan mahkamah majistret terhadap Agensi Pekerjaan Dzh Sdn Bhd ('plaintif pertama'), yang merupakan penyewa defendan pertama bagi sekeping tanah ('tanah tersebut') dengan bangunan empat tingkat di atas tanah tersebut ('premis tersebut') melalui perjanjian penyewaan bertarikh 12 Disember 2013 ('TA 2013'). Menurut TA 2013, tempoh penyewaan dikatakan dari 2014 hingga 2017. Selain itu, kedua-dua defendan pertama dan plaintif pertama telah sama-sama bersetuju bahawa plaintif pertama akan menyewa tanah tersebut untuk tempoh lima belas tahun dari 2014 hingga 2029. Dalam tindakan pertama ('Tindakan 183'), defendan keempat memohon relif bagi milikan kosong premis tersebut terhadap plaintif pertama dan dalam tindakan kedua ('Tindakan 837'), defendan pertama memohon mendapatkan semula sewa dan caj-caj tertunggak terhadap plaintif pertama. Permohonan defendan keempat bagi mendapatkan penghakiman terus terhadap plaintif pertama dalam kedua-dua tindakan tersebut dibenarkan tetapi rayuan plaintif pertama terhadap keputusan tersebut telah ditolak oleh Mahkamah Tinggi. Plaintif kemudiannya memulakan tindakan ('tindakan sivil') terhadap defendan dengan mendakwa bahawa selepas menandatangani beberapa kertas kosong atas pengaruh defendan ketiga, plaintif dimaklumkan

bahawa defendan pertama telah melupuskan tanah tersebut bersama-sama premis tersebut kepada Tropicana Laris Sdn Bhd ('defendan ketujuh'). Dalam notis tersebut, ia telah didedahkan bahawa defendan ketujuh telah menamakan defendan keempat untuk menerima pindahmilik dan menurut penyerahan hak tersebut, menyerahkan sepenuhnya kepada defendan keempat semua hak, hak milik, faedah dan kepentingan defendan ketujuh di bawah perjanjian penyewaan bertarikh 25 April 2019 ('TA 2019 yang dipersoal'). Plaintif juga mendapat tahu bahawa defendan ketujuh telah membeli tanah tersebut bersama-sama dengan premis tersebut daripada defendan pertama, enam bulan selepas TA 2019 yang dipersoal telah dilaksanakan dengan sewajarnya dan disempurnakan oleh plaintif pertama. Ia adalah dakwaan lanjut plaintif bahawa semua defendan telah berkomplot dan melakukan penipuan untuk menipu plaintif dalam memasuki TA 2019 yang dipersoal untuk melupuskan tanah dipertikaikan tersebut di mana plaintif sedang menddukinya ketika itu. Defendan pertama hingga ketujuh memohon untuk membatalkan tuntutan plaintif terhadap mereka di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 atas alasan bahawa tuntutan plaintif dihalang oleh doktrin res judicata berdasarkan penghakiman mahkamah majistret dalam tindakan 183 dan 837. Pesuruhjaya kehakiman ('PK') membenarkan permohonan pembatalan dan mengarahkan kos sebanyak RM15,000 dibayar oleh plaintif kepada setiap defendan. Oleh kerana tidak berpuas hati dengan keputusan Mahkamah Tinggi, plaintif merayu kepada Mahkamah Rayuan melalui empat notis rayuan yang berasingan.

Diputuskan, menolak rayuan dengan kos:

(1) Isu dan/atau dakwaan penipuan, salah nyata dan sebagainya, yang dibangkitkan dalam saman sivil telah dihalang di bawah res judicata kerana isu-isu ini telah dibicarakan dan diputuskan dengan muktamad. Dakwaan sedemikian adalah rekaan semata-mata imaginasi plaintif yang dibangkitkan untuk tujuan cagaran untuk menangguhkan tuntutan oleh defendan pertama dan defendan keempat. Sekadar menyebut penipuan atau salah nyata yang didakwa dalam tuntutan tidak secara automatik membenarkan pertimbangan tuntutan untuk dibicarakan. Mahkamah mesti menentukan sama ada pliding telah mendedahkan tuntutan yang munasabah dan sama ada keterangan yang dikemukakan semasa permohonan pembatalan membenarkan sebarang perbicaraan. Jika tuntutan itu jelas remeh dan nyata jelas tidak dapat dipertahankan, maka ia harus dibatalkan (lihat perenggan 45–46).

(2) Ia adalah jelas dan nyata bahawa plaintif hanya membuat satu lagi pusingan percubaan untuk memulakan semula isu yang telah ditentukan. Ia kini tidak boleh dikaji semula atau ditegaskan semula dengan sebarang samaran dalam prosiding berikutnya kerana ia merupakan satu penyalahgunaan proses mahkamah. Memandangkan kedua-dua saman itu timbul daripada set fakta yang sama, doktrin isu

estoppel akan terpakai. Undang-undang tidak membenarkan plaintif mendapat peluang kedua. PK adalah betul dalam membenarkan permohonan defendan untuk membatalkan writ saman dan pernyataan tuntutan plaintif yang difailkan terhadap defendan. Tuntutan plaintif telah dilakukan dengan niat mala fide, remeh dan tidak dapat dipertahankan (lihat perenggan 44 & 47).

(3) Memandangkan plaintif pertama enggan membayar sewa tertunggak walaupun terus menduduki premis tersebut, defendan keempat kemudiannya telah memulakan Tindakan di Mahkamah Tinggi untuk sewa tertunggak dan penghakiman telah diberikan, selepas pendengaran dakwaan penipuan, salah nyataan, konspirasi yang sama yang dibangkitkan oleh plaintif pertama pada peringkat itu. Mahkamah Tinggi juga telah mengisytiharkan bahawa TA 2019 telah ditamatkan secara sah dan di sisi undang-undang dan oleh itu tiada isu dakwaan penipuan, salah nyata dan lain-lain. Oleh kerana tiada rayuan difailkan oleh plaintif pertama terhadap keputusan Mahkamah Tinggi yang menolak rayuan plaintif pertama, penghakiman terus sah dan mengikat pihak-pihak dan mesti dipatuhi. Ia akan menjadi res judicata bagi plaintif untuk mengemukakan perkara yang sama dalam tindakan baru (lihat perenggan 48–49).

(4) Pengakuan plaintif mengenai kewujudan penyewaan, persetujuannya untuk menyerahkan semula harta tersebut kepada defendan keempat dan meminta diskaun diberikan ke atas jumlah tertunggak, menyebabkan plaintif tidak dapat menafikan kesahihan penamatan penyewaan. Tuduhan kosong tentang penipuan, salah nyata atau pemalsuan yang timbul apabila defendan pertama memfailkan tindakan terhadap plaintif pertama untuk bayaran tertunggak sewa dan caj melalui Tindakan 183 dan Tindakan 837 untuk milikan kosong tanah, menguatkan fakta bahawa tuntutan plaintif pertama adalah tidak wajar, hanya alasan semata-mata untuk melepaskan liabiliti dan tidak membentuk sebarang isu yang boleh dibicarakan. Tiada kekhilafan atau salah arah di pihak PK dalam membuat keputusan sedemikian yang memerlukan campur tangan rayuan (lihat perenggan 51 & 53–54).]

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417; [2000] 1 MLRA 111, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors [2011] 5 MLJ 521, FC (refd)

See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2013] 4 MLRA 259, CA (refd)

Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 MLJ 492, CA (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19

Appeal from: *Agensi Pekerjaan DZH Sdn Bhd & Anor v Genting Development Sdn Bhd & Ors* [2022] MLJU 2289 (High Court, Kuala Lumpur)

Chang Aik Ming (Chang Aik Ming & Co) for the appellant.
Jasbeer Singh (with Parvinder Kaur Sandhu and Muhammad Nurluqman bin Dzulaidin Tasrin) (Jasbeer Nur & Lee) for the respondents.

Azmi Ariffin JCA:

INTRODUCTION

[1] There are four separate notice of appeal filed before this honourable court for us to decide. They are as follows:

(a) W-02(1M)(NCVC)-1784–09 of 2022:
Appeal against the decision of the High Court which had allowed defendants' application to strike out plaintiff's writ and amended statement of claim (encl 31) with costs of RM15,000;

(b) W-02(1M)(NCVC)-1785–09 of 2022:
Appeal against the decision of the High Court which had allowed defendants' application to strike out plaintiff's writ and amended statement of claim in (encl 34) with costs of RM15,000;

(c) W-02(1M)(NCVC)-1786–09 of 2022:
Appeal against the decision of the High Court which had allowed defendants' application to strike out plaintiff's writ and amended statement of claim in (encl 36) with costs of RM15,000;

(d) W-02(1M)(NCVC)-1796–09 of 2022
Appeal against the decision of the High Court which had allowed defendants' application to strike out plaintiff's writ and amended statement of claim in (encl 18) with costs of RM15,000; and

[2] To facilitate the determination of these four appeals, we find it more convenient to decide the appeals in a single judgment as they are interrelated.

BRIEF FACTS

[3] There were two suits filed by the first defendant and the fourth defendant before the Kuala Lumpur Magistrate Court against the first plaintiff.

[4] In Suit No WA-A72-183–11 of 2020, the fourth defendant was seeking a recovery for vacant possession of the property.

[5] In Suit No WA-A72NCvC-837 of 2021, the first defendant was seeking recovery of rentals and charges outstanding against the first plaintiff.

[6] These two suits were commenced separately by each of the aforesaid defendant against the first plaintiff.

[7] The fourth defendant sought summary judgment against the first plaintiff in Suit 183 and was successful in the proceedings before the magistrate court. The magistrate court found in favour of the fourth defendant and entered summary judgment against the first plaintiff on 4 March 2021 in the 183 Suit.

[8] The first plaintiff then filed an appeal against the decision of the magistrate court. The appeal was dismissed by the High Court in the Civil Appeal No WA-11ACVC-37–02 of 2021 on 20 April 2021.

[9] The first defendant also sought summary judgment against the first plaintiff in 837 Suit and judgment was entered on 28 May 2021. An appeal was filed against the said decision and apparently dismissed by the High Court.

[10] The first to seventh defendants have applied to strike out the claim against them under O 18 r 19 of the Rules of Court 2012 on the ground that the plaintiffs claims are barred by the doctrine of *res judicata* based on the judgments of the magistrate court in suits bearing No WA-A72-183–11 of 2020 and WA-A72NCvC-837 of 2021 instituted by the first and fourth defendants.

[11] On 8 September 2022, the learned judicial commissioner allowed the first to seventh defendants striking out application and ordered costs of RM15,000 to be paid by the plaintiffs to each of the defendants and that the plaintiffs are jointly and severally liable to the defendants.

[12] Being dissatisfied with the High Court decision, the plaintiffs filed this appeal to the Court of Appeal.

THE RELEVANT PROVISION OF LAW

[13] The laws applicable are as follows:

(a) O 18 r 19 of the Rules of Court 2012:

Striking out pleadings and endorsement (O 18 r 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

LAW ON STRIKING OUT

[14] In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, the Supreme Court through the judgment delivered by Mohamed Dzaiddin bin Hj Abdullah SCJ (as he then was) held as follows:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (Attorney-General of Duchy of *Lancaster v L & NW Ry Co.* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871(CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in para materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[15] Similarly, in *Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521, the Federal Court had the occasion to deal with an application to strike out a petition to wind up a company. The court opined that its should only allow application to strike out a winding-up petition where the petition itself was obviously unsustainable for want of cause of action or it being vexatious, frivolous or an abuse of process. The Federal Court cited with approval the dicta by the Court of Appeal in *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492:

> We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged. In our view, the use of that procedure in such winding up proceeding

produces only delay in the adjudication of the matter. Of course, we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious, frivolous or even an abuse of process. In such a case, O 18 r 19 could be resorted to.

[16] In *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 4 MLRA 259, the Court of Appeal speaking through Ramly Ali JCA (as he then was) opined as follows:

[11] The learned judge must bear in mind that striking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable.

Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see Federal Court decision in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226; [1984] 1 MLRA 771.

[17] The Court of Appeal in *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417; [2000] 1 MLRA 111 through Mokhtar Sidin JCA (as he then was) delivering the judgment of the court held as follows:

[14] In considering whether Carah's statement of claim is scandalous, frivolous or vexatious under O 18 r 19(1)(b), or is an abuse of the process of the court under O 18 r 19(1)(c) or under the inherent jurisdiction of the court under O 92 r 4, the court is entitled to look at the affidavit evidence and the exhibits. Looking at the above pleadings, and the lengthy affidavits and the various exhibits filed by Carah and the lenders, there is a serious conflict of material affidavit evidence which can only be resolved by subjecting the deponents to cross examinations and/or calling other witnesses whose evidence can only be evaluated by the court after seeing and hearing them. The court cannot conduct a trial on the silent cold-printed or typewritten words in the opposing affidavits where there is a serious dispute or conflict on material facts, a finding of which by the trial judge will have a decisive consequence on the case of the parties. We are mindful of what Lord Diplock said in the House of Lords in *American Cyanamid v Ethicon Ltd* [1975] AC 396 at p 407:

> ... *The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.*
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to be decided difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

A SUMMARY OF THE PLAINTIFFS VERSION

[18] The first plaintiff was and still is the tenant of first defendant for a piece of land held under Title No Geran 10458 Lot 17680 Mukim Bentong, daerah Bentong, Padang (with an approximately 19,164 square metres or 4.7 acres) ('the said land') and a four storeys building was erected thereon on the said Land at Genting Highlands, Pahang ('the said demised premises') vide a tenancy agreement dated 12 December 2013.

[19] Pursuant to the tenancy agreement 2013, the commencement of the tenancy period is from 1 April 2014 (with a four months free rental period from 1 December 2013 to enable first appellant to renovate the said demised premises) and expiring on 31 March 2017 at the agreed monthly rental of RM35,000 with a renewal term of two years from 1 April 2017 to 31 March 2019 at the monthly rental rate of RM56,000. Both the first defendant and first plaintiff had mutually agreed that first plaintiff shall rent the said land for a total period of 15 years from 2014 until 2029 with the agreed monthly rental represented in section 10 of the third Schedule of the tenancy agreement 2013.

[20] The first defendant had delivered vacant possession of the land together with the said demised premises to the first plaintiff in accordance with the terms and conditions stated in the tenancy agreement 2013. The first plaintiff, then spent approximately RM10m for the renovation to transform the said demised premises into a three star hotel. The first plaintiff and the second plaintiff/first plaintiff had worked together to run the hotel and restaurant on the said demised premises.

[21] Vide letter dated 1 March 2019, the first defendant informed the first plaintiff that the next renew term tenancy period will commence from 1 April 2019 to 31 March 2022 with the monthly rental of RM60,000 and a further term renew commencing from 1 April 2022 to 31 March 2024 at the rate of RM64,000 monthly. This letter was signed by the second defendant who was the managing director of the first defendant and duly accepted and acknowledged by Chen ZhengZheng, director of the first plaintiff and second plaintiff respectively on 27 March 2019. The third defendant who was the employee of the first defendant was appointed and authorized by the first defendant and second defendant to manage the affairs of the said demised premises between the first defendant and first plaintiff.

[22] Sometime on 13 April 2019, the first defendant through the third defendant had met the first plaintiff's director, ie Chen ZhengZheng and gave her three pieces of blank papers (A4 size) for the purpose of renewal of the tenancy period of the demised premises which the first plaintiff is mandatory to sign.

[23] Chen ZhengZheng had replied to the third defendant that the tenancy agreement 2013 had provided a continuance of tenancy period of 15 years together with the agreed increment of the monthly rental, hence, no necessity for the parties to sign whatsoever papers or documents for the extension/renewal of the said tenancy.

[24] The first plaintiff under the firm representation and influence of the third defendant through the first defendant, signed the three pieces of blank papers without any hesitation or suspect any doubts whatsoever.

[25] From the date of signing the three pieces of blank papers, the plaintiffs (especially first plaintiff) did not hear from the first defendant at all in respect of the contents of the said three pieces of blank papers. The plaintiffs are relying on paras 28, 29 and 30 of the statement of claim, in particularly the misrepresentation, undue influence, corroboration and hoaxes of first defendant through third defendant.

[26] Sometime on 9 March 2020, the first plaintiff (through Chen ZhengZheng) was called by the third defendant on behalf of the first defendant to attend to the first defendant's office to sign a consent letter. Upon her arrival at the first defendant's office, the third defendant had showed to the first plaintiff, a piece of typewritten paper and demanded the first plaintiff to sign and acknowledge, which the first plaintiff had flatly turn down the first defendant's demand and requested that the piece of paper be brought back and seek legal advice before signing it. The third defendant, then threatened the first plaintiff and refused to allow Chen ZhengZheng to leave and demanded that the first plaintiff must sign even though the stamp not does belong to the first plaintiff, but the second plaintiff.

[27] On 13 March 2020, vide a notice dated 10 March 2020 signed by the second defendant, the first plaintiff, was informed that the first defendant had disposed the said land together with the said demised premises to Cenang Laris Sdn Bhd, ie seventh defendant. In the said notice, it was revealed that the seventh defendant had nominated the fourth defendant (Raindust Realty Sdn Bhd) to accept the transfer and pursuant to the said assignment, assigned absolutely to the fourth defendant all the seventh defendant's rights, title, benefit proceed and interest therein under the tenancy agreement dated 25 April 2019 ('alleged TA 2019').

[28] The plaintiffs were utterly shocked on the alleged TA 2019 until the plaintiffs were provided a copy of the alleged TA 2019 by the fourth defendant's former solicitors, Messrs Mah-Kamariyah & Philip Koh on 23 September 2020.

A **[29]** The alleged TA 2019 was purportedly prepared by a firm of solicitors named Messrs Teh & Azlina. The plaintiffs through its former solicitors, Messrs KF Wong & Lee, had wrote to Messrs Teh & Azlina to seek their confirmation of the preparation of the alleged TA 2019. Unfortunately, the plaintiffs received the answer in the negative.

B

[30] The tenancy agreement 2013 and the alleged TA 2019 were almost identical except few clauses in the alleged TA 2019, which the rights of the first plaintiff had been removed totally by the first defendant without the knowledge, consent and authority of the first plaintiff. The signing page of the
C alleged tenancy agreement 2019, in fact, was the three pieces of blank papers under the representation and influence of the third defendant through the first defendant to sign.

D **[31]** Upon the filing of this auit and subsequently the notice of application filed by the defendants herein in different notices of applications, the plaintiffs came to know that the seventh defendant vide a sale and purchase agreement dated 18 October 2019, had purchased the said land together with the said demised premises from the first defendant that is, six months after the
E purported alleged tenancy agreement 2019 was duly executed and perfected by the first plaintiff.

[32] All the defendants had conspired and committed fraud to defraud the plaintiffs in entering into the alleged tenancy agreement 2019 and shortly after
F the alleged tenancy agreement 2019, ie on first defendant had entered into a sale and purchase with seventh defendant on 18 October 2019 to dispose the land in dispute where the plaintiffs are occupying then.

[33] The validity of the transfer to the seventh defendant had prejudiced the
G plaintiffs' legal rights in the tenancy agreement 2013 and option to purchase the land.

[34] The plaintiffs vide the tenancy agreement 2013, had spent/incurred the costs of renovation approximately in the sum of RM10m to transform the said
H demised premises into a three-star hotel with full facilities in reliance that the first defendant has agreed to let the said demised premises to the plaintiffs for the term of 15 years subject to the terms and conditions in the tenancy agreement 2013.

I **[35]** The consequence of the alleged tenancy agreement 2019 (derived from the conducts of the defendants herein) had prejudiced and caused the lawful rights of the plaintiffs in the tenancy agreement 2013 been wiped off in toto and caused the plaintiffs to suffered damages and losses on the said demised premises, especially the costs of renovation.

[36] The conducts of the defendants had blatantly reaped the plaintiffs' rights and interests of the said demised premises at the expense of the plaintiffs. The defendants, especially first defendant and seventh defendant indirectly had enriched unreasonably on the improvements/appreciation of the land and the said demised premises by the plaintiffs solely.

[37] The first defendant knew that the plaintiffs had spent monies to improve the land and the said demised premises, yet the first defendant without the knowledge of the plaintiffs stealthily removed the term 'Option To Purchase' in the alleged tenancy agreement 2019 which had caused the plaintiffs to suffered losses thereof.

[38] The first defendant then sold the land to the seventh defendant, totally disregard the interest of the plaintiff, indirectly unjustly enrich from the appreciation of the land at the expense of the plaintiffs solely.

[39] There was mala fide of the defendants which is not appropriate to be disposed of summarily by way of O 18 r 19 of the Rules of Court 2012.

SUMMARY OF THE DEFENDANTS VERSION

[40] The allegations of fraud, misrepresentation, conspiracy etc are factually not present in this cases.

[41] *Res judicata* is applicable to these issues as they have been dealt with in finality in the previous suits involving first plaintiff and fourth defendant. The alleged issues raised by the plaintiffs in the High Court have already been dealt with by the magistrate court vide Suit No WA-A72-183–11 of 2020 in which the court had allowed the fourth defendant's claims *vide* a summary judgment application and ordered that first plaintiff is to vacate the demised premises immediately.

[42] Upon the first appellant filing an appeal at the High Court, the High Court had affirmed the said magistrate's court decision and subsequently first plaintiff filed an appeal to the Court of Appeal. This appeal was then withdrawn by the first plaintiff. As such the issues raised by the first plaintiff of alleged fraud etc in the tenancy agreement 2019 were heard and disposed of and there is finality of those issues thus *res judicata* applies.

[43] The mutual termination of the tenancy agreement 2019 was valid due to the failure of the first plaintiff in continuing to pay the rental.

Summary of the High Court decisions

A (a) the magistrate court had considered the alleged issues of fraud, misrepresentation, conspiracy etc as it was brought up in the defences and/or pleadings in those suits by the first plaintiff and the issues pleaded in the earlier suits and the instant one appears to be similar in nature;

B (b) the doctrine of *res judicata* is applicable. The plaintiffs are barred from relitigating the same issues. The plaintiffs admits that the issues raised before the magistrate court and before the High Court are related and that the cause of action in the High Court as well as the claim and defence in the magistrate court are connected and arise from the same facts, same C issues, same legal arguments and that these parties are 'privies' to the same parties in the earlier suits;

(c) the first plaintiff did decide to add a co-plaintiff and join additional defendants to this suit in its attempt to circumvent the rule of *res judicata*. D The addition of additional litigants and additional defendants, does not mean that *res judicata* does not apply;

(d) Suit 183 instituted by the fourth defendant and 837 suit instituted by the first defendant on the same defences/issues were rejected by the learned magistrate and affirmed by the High Court; E

(e) the plaintiff's letter dated 2 October 2020 admits the validity of the tenancy, its termination and agreed to surrender the property;

(f) if indeed the defendants were guilty of misrepresentation, fraud or forgery as suggested, the plaintiffs would have immediately issued a F response to the termination, which they failed to do so, indicating that these are a mere afterthought of the plaintiffs meant to delay the claims by the first defendant and the fourth defendant;

(g) even without relying on the doctrine of *res judicata*, the plaintiffs' claim G should be struck out. The letter dated 2 October 2020 speaks loudly that the first plaintiff admits the validity of the termination of the tenancy and the obligation to return the land to the landlord. They even sought a discount for the sums outstanding under the terms of the tenancy. Otherwise, the plaintiffs would have surely not accepted the termination H and not agreed to return the said land; and

(h) this suit is an abuse of process of court as the plaintiffs are attempting to reopen the same claim/defence afresh. If the plaintiffs are unhappy with the outcome of the previous suits, then they should have filed leave to I appeal to the Court of Appeal and not pursue this fresh suit. The claim against the first defendant to seventh defendants be struck out as the claim was so obviously or plainly unsustainable.

OUR DECISIONS

[44] We had the opportunity to perused and analysed all parties cause papers and submissions together with the authorities and in our humble opinion, the learned judicial commissioner was correct in allowing the defendants application to strike out the plaintiffs writs of summons and statement of claim filed against the defendants. The plaintiffs claim is an abuse of the court process done with *mala fide* intentions, clearly frivolous and patently unsustainable. We now give our reasons.

[45] The issues and/or allegations of frauds, misrepresentation etc, raised in the civil suit is caught under *res judicata* as these issues have been ventilated and decided with finality. We find that such allegations are mere figments of the plaintiffs imagination raised for a collateral purpose of delaying the claims by the first defendant and the fourth defendant.

[46] It is also pertinent to emphasise that the mere mention of fraud or misrepresentation alleged in a claim does not automatically justify the setting down of a claim for trial. This court must in the first place analysed and determined whether the pleading discloses a reasonable claim and whether the evidence produced during a striking out application justify any trial. If the claim is clearly frivolous and patently obviously unsustainable, then it should be struck out.

[47] From the chronology of event, is it crystal clear and unambiguous that the plaintiffs is just making another round of attempt to relitigate issues that had already been determined, which to us is perfectly unacceptable as it amount to an abuse of the court's process. It cannot now be revisited or reasserted under any guise in a subsequent proceeding. Since both suits arose from the same set of facts, the doctrine of issue *estoppel* will certainly apply. The law does not allow the plaintiffs to have a second bite of the cherry.

[48] Since the first plaintiff refused to pay the outstanding rentals despite continuing to occupy the demised premises, the fourth defendant had then initiated a suit at the Kuala Lumpur High Court on 21 January 2021 for the outstanding rentals *vide* Suit No WA-24NCVC-152–01 of 2021. Judgment had been given on 28 April 2023, after hearing of the same allegations of fraud, misrepresentation, conspiracy, etc in tenancy agreement 2019 raised by the first plaintiff at that stage. The High Court had also declared that the tenancy agreement 2019 was validly and lawfully terminated and hence there was no issue of the alleged fraud, misrepresentation etc.

[49] There was no appeal filed by the first plaintiff against that High Court decision dismissing the first plaintiff's appeals. Accordingly, the judgment

continues to be valid and binding on the parties and must be obeyed. As said, it would be *res judicata* for the plaintiffs to raise the same in a fresh suit (the fresh suit was only filed on 7 May 2021 and writ was served on 12 May 2021 on the first defendant).

[50] As can see in the decisions of the magistrate courts, these allegations were rejected as mere afterthoughts and they are supported by the letter dated 2 October 2020 and notice of assignment as agreed to by the plaintiffs and Chen Zheng Zheng. It is germane, at this juncture, to produce below the contents of the said letter issued by the first plaintiff to the landlord which states:

> We would like to inform that we, Agensi Pekerjaan DZH Sdn Bhd received and noted on your letter about Notice of Termination. We wished and agreed to terminate the tenancy as well. We had informed our personnel about the termination and instructed them to vacate from the above premise with immediate effect and return the demised premise to your good self, the landlord before 13th October 2020. In the event there are people refuse to vacate the demised premise, we wish to highlight that these people are not representative of our company and their actions do not represent the wishes of our company. We wish to reiterate as per our letter to you dated 25th September 2020, Ms Chen Zheng Zheng is no longer allowed to represent our company...We noted on the outstanding rental owing to you, ... we would like to request for discount from your goodself ... We hope you could allowed a discount of three months rental, that is RM 180,000.

[51] The above evidence obviously shows that the plaintiff's had admitted the existence of the tenancy, its agreement to surrender the said property back to the fourth defendant and requested for discount to be given on the sums outstanding, hence makes it impossible for the plaintiffs to denied the validity of the termination of the tenancy. This coupled with the bare allegations of fraud, misrepresentation, or forgery were only surface when the first defendant filed the suits against first plaintiff for outstanding payments of the rentals and charges (WA-A72-183–11 of 2020) and the fourth defendant suit (WA-A72NCVC-837 of 2021) for vacant possession of the land. This further strengthens the facts that the first plaintiff claims is unjustified, a mere excuse to escape liability and does not constitute any triable issue.

[52] Finally, let it be repeated that in the present appeal before this Honourable Court, the alleged issues raised by the plaintiffs in the High Court have already been dealt with by the magistrate court vide Suit No WA-A72-183–11 of 2020 in which the High Court had allowed the fourth defendant's claims *vide* a summary judgment application and ordered that first plaintiff is to vacate the demise premises immediately. Essentially, the allegations that appear in the defence in the magistrate court and the amended

statement of claim in this proceeding raises the same facts, same issues, and same contentions.

CONCLUSION

[53] Bearing in mind the established principle stated in the above cases and having appraised ourselves of the relevant provision of the law, the documentary evidence before us, the oral and written submission made by the learned counsels, we unanimously find no error or misdirection on the part of the learned judicial commissioner in coming to such a decision that warrants appellate intervention.

[54] The appeals are without merit and is dismissed with a global cost of RM20,000 for Civil Appeal No:

(a) W-02(IM) (NCVC)-1784–09 of 2022;

(b) W-02(IM) (NCVC)-1785–09 of 2022;

(c) W-02(IM) (NCVC)-1786–09 of 2022; and

(d) W-02(1M)(NCVC)-1796–09 of 2022,

subject to allocatur fees of 4% of the costs awarded.

Appeal dismissed.

Reported by K Selvaraju